RECENT CASES.

APPEAL AND ERROR—EFFECT OF APPEAL ON JUDGMENT BELOW—WHEN TRIAL IS *de Novo*—The mere appeal from a decree vacating probate of a will does not have the effect of vacating the decree merely because the trial in the Supreme Court is *de novo,* and the dismissal of the appeal, though wrongful, does not vacate the decree appealed from. Stewart *et al.* v. O'Neal, 237 Fed. Rep. 897 (Ohio 1917).

While this point is almost always regulated by statute, the courts seem to have divided into two groups. On the one hand it is held that the judgment of the lower court is not annulled by an appeal; it is at most merely suspended and is binding upon the parties as to every question directly decided. Black v. Black, 111 N. Car. 300 (1887); Dinwiddie v. Shipman, 183 Ind. 86 (1915). Under this view, the appeal does not preclude the parties from suing on the judgment, or from prosecuting collateral or independent proceedings. The principal case follows this view. On the other hand, other jurisdictions take the view that when an appeal is taken, the judgment appealed from is vacated and annulled, and the litigants are, with respect to their legal rights, just where they were at the commencement of the suit. Butler v. U. S. Savings & Loan Co., 97 Tenn. 679 (1896); Klicka v. Klicka, 105 Ill. App. 369 (1903); Schenck v. Boston Elevated Rly. Co., 207 Mass. 437 (1911). The courts adhering to this view take the position that the judgment appealed from cannot be the foundation of a new action.

BANKRUPTCY—DEBTS NOT RELEASED BY DISCHARGE—LIABILITIES FOR OBTAINING PROPERTY BY FALSE PRETENSES—A bankrupt had made false representations as to his financial condition in obtaining a bond from a surety company. The bankrupt defaulted and the surety company paid. *Held:* A judgment in favor of the surety company was not released by his discharge. *In re* Dunfee, 114 N. E. (N. Y.) 52.

Section 17 of the Bankruptcy Act provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations."

The court held that obtaining the bond by the false representations and paying the obligee must be regarded as all one transaction. This was equivalent to payment by the surety company to the bankrupt and by him to the obligee. The bankrupt therefore obtained property by false pretenses. Money has been held to be property within the meaning of this section. Hallagan v. Dowell, 139 N. W. 883 (Ia. 1913).

The only similar case to be found arising under section 17 is in accord. Gaddy v. Witt, 142 S. W. 926 (Tex. 1911).

But the same circumstances were held not to bar a discharge under section 14 of the Bankruptcy Act. *In re* Tanner, 192 Fed. 572 (1911). This case may be distinguished from the principal case on two grounds. Section 14 as relevant to this case, *i. e.*, before the amendment of 1910, provided: "The judge shall . . . discharge the applicant unless he has . . . (3) obtained property on credit from any person upon a materially false statement in

writing made to such person for the purpose of obtaining such property on credit." In the first place, the court considered whether the bond itself and not the money finally paid out, was "property" within the meaning of the act, and held that it was not. It was aided in arriving at this decision by the fact that in the amendment of 1910 "money or" was inserted before "property," which would indicate that it was doubtful if even money was "property" within the meaning of the section before the amendment, much less mere contingent liability to pay money, as this bond. Because of its effect in preventing any discharge, it is natural that the word "property" in section 14 should be more strictly construed than the same word in section 17, which merely excepts individual liabilities from the effects of a discharge.

Secondly, the court was of the opinion that even though the bond was property it was not obtained "on credit," because the relation of debtor and creditor did not exist after the delivery of the bond any more than before. There is no provision that the property must be obtained on credit in section 17.

CARRIERS—STREET RAILWAY COMPANIES—PERSON BOARDING CAR—An intending passenger boarded the rear platform of a moving trolley, which collided with a train as he was proceeding to enter the car. The court held it a question for the jury whether the contractual relation of carrier and passenger existed at the time of the accident. Berkebile v. Johnstown Traction Company, 255 Pa. 310 (1917).

The essentials necessary to the relationship of passenger and carrier are an undertaking by a person to travel in the carrier's conveyance, and an acceptance by the carrier. Berry v. Mo. Pacific Ry. Co., 124 Mo. 223 (1899).

Whether these elements existed is a question of fact for the jury, and it seems clear that though a prospective passenger boarded the car negligently, this does not bar his becoming a passenger if subsequently accepted as such. Geiger v. Pittsburgh Railways Co., 237 Pa. 287 (1915). Though a rule forbidding entrance or exit while the car is in motion be displayed, if it appears the rule was waived, the relationship is as sufficiently established as if the entrance had been proper. The North Chicago Street Railway Co. v. Williams, 140 Ill. 275 (1892).

As to injuries received in boarding or alighting from a moving car, the dominant rule is that it is not negligence *per se* to attempt to board or alight from a moving car. O'Mara v. St. Louis Traction Co., 102 Mo. App. 202 (1903); Birmingham Railway Light & Power Co. v. Girod, 164 Ala. 10 (1909). Though so attempting is not negligence *per se* in most instances, it may be so when, under the attendant circumstances, the attempt was so obviously dangerous that a man of ordinary prudence would not try it. Fosnes v. Duluth Street Railway Co., 140 Wis. 455 (1909).

The jury should consider the speed of the car, whether the person was encumbered with bundles, *etc.* Watkins v. Birmingham Ry., 120 Ala. 147 (1897).

In Hunterson v. Union Traction Co., 205 Pa. 568 (1903), a divided court declared the Pennsylvania rule to be, *contra* to the usual rule, that it is negligence *per se,* except in rare cases, to alight from or board a moving car.

Such a rare exception occurred in Powelson v. United Traction Co., 216 Pa. 583 (1907), and the question was there held to be for the jury.

In Berkebile v. Johnstown Traction Co., *supra*, the court, since the evidence was such that it could not be declared as a matter of law that the plaintiff had not become a passenger, a judgment of nonsuit was reversed with a procedendo, the jury to determine, in accord with the general rule, the status of plaintiff at the time of the accident.

CONTEMPT—NEWSPAPER PUBLICATION—PRESENCE OF COURT—OBSTRUCTION OF JUSTICE—Section 725, Revised Statutes, limits the power of federal courts to punish for contempt, to misbehavior in their presence or so near thereto as to obstruct the administration of justice. A newspaper company published articles tending to provoke resistance to an injunctional order should one be granted in a pending suit. *Held:* The publication was a contempt punishable under the statute. Toledo Newspaper Co. v. United States, 237 Fed. 986.

At common law any publication concerning a pending cause, calculated to prevent a fair and impartial trial or seeking to influence judicial action by any form of intimidation, or tending to corrupt or embarrass the administration of justice, constituted contempt. State v. Bee Publishing Co., 60 Neb. 282 (1900); McDougall v. Sheridan, 23 Idaho 191 (1913). It was at first thought that the Act of Congress referred to in the principal case deprived the courts of jurisdiction to proceed for contempt against any newspaper publication, no matter how scandalous. *Ex parte* Poulson, 19 Fed. Cas. 1205 (No. 11350) (1835). It was held that a newspaper editorial which only criticised the official conduct and integrity of the court was not liable for contempt. *In re* Daniels, 131 Fed. 95 (1904). But the attitude of the federal courts has changed. The rule has recently been laid down that this statute applies to all acts of misbehavior whose natural tendency and effect is to interfere with the administration of justice, wherever committed. U. S. v. Huff, 206 Fed. 700 (1913). The decision in the principal case is a final vindication of the power of the federal courts to protect themselves. The decision in the district court (220 Fed. 458, 1915) is an admirable monograph on the law of contempt in the federal courts.

In Pennsylvania, by the Act of June 16, 1836, P. L. 784, Par. 26, it is provided that no publication out of court shall be construed into a contempt. See *In re* Greery, 4 W. N. C. 308 (1877). In this rule Pennsylvania stands practically alone. For a résumé of the law in other jurisdictions, see 61 U. PA. L. REV. 516 and 64 U. PA. L. REV. 97.

CONTRACTS—CONSIDERATION—SUBSCRIPTION—Action on a promissory note executed in payment of a subscription to a church building fund. *Held:* The incurring of liabilities in reliance on a promise to subscribe is sufficient consideration to bind the promisor. Erdman v. Trustees of M. E. Church, 99 Atl. 793 (Md. 1917).

The case seems in accord with the weight of authority today, *In re* Converse's Estate, 240 Pa. 458 (1913), and the cases collected in 62 U. PA. L. REV. 222. It is said that this doctrine of enforcing voluntary subscriptions cannot be upheld on any satisfactory theory of law, 15 Harv. L. Rev. 312; 62

U. PA. L. REV. 296, and this view is adopted by several jurisdictions in part at least. Church v. Kendall, 121 Mass. 528 (1877); Presbyterian Church v. Cooper, 112 N. Y. 517 (1889). These jurisdictions, however, seem today to be tending toward the general rule, Robinson v. Nutt, 185 Mass. 345 (1904); Locke v. Taylor, 161 App. Div. 44 (N. Y. 1914), which based its decision on the authority of Keuka College v. Ray, 167 N. Y. 96 (1901). This case approved of Presbyterian Church v. Cooper, *supra,* but raised an implied request by the promisor that work be done or a liability incurred which Church v. Cooper refused to do. Locke v. Taylor, *supra,* apparently misinterprets Keuka College v. Ray and cites it as laying down the majority rule.

The theory, deemed most satisfactory by precedent, views the subscription as an offer of a unilateral contract accepted by performing the condition or by incurring liability in reliance on the offer. Trustees v. Garvey, 53 Ill. 401 (1870); Board of Trustees v. Noyes, 165 Iowa 601 (1914). It is said that this theory is based on a violent implication of a request by the promisor that the work be done or the liability be incurred. That this implication is in accord with the historical development of legal implications in contract is most clearly shown in Professor Ames' profound article on the History of Assumpsit, 3 Select Essays in Anglo-American Legal History, 259.

The entire doctrine today is in a most unsatisfactory condition, as many courts still cling to generally discarded theories. Lasar v. Johnson, 125 Cal. 549 (1899); Rousseau v. Call, 169 N. C. 173 (1915). The modern tendency is basis, however unsatisfactory by itself. Brokaw v. McElroy, 162 Iowa 288 to practically base the doctrine on public policy with almost any reason for a (1913).

CONTRACTS—ILLEGAL AS AGAINST PUBLIC POLICY—RECOVERY FROM A STAKEHOLDER—Republican and Democratic nominees for jailer agreed that the Democrat should withdraw, and, when elected, the Republican would appoint him deputy and divide the fees. The Republican deposited $500 with a stakeholder to be given the Democrat if the agreement was not carried out. The agreement was fulfilled, but the stakeholder refused to give back the money. *Held:* It could not be recovered from him. Martin v. Francis, 191 S. W. 259 (Ky. 1917).

An illegal contract can be rescinded and money recovered from a stakeholder if it has not been paid over, although the contingent event has happened. McAllister v. Hoffman, 16 S. & R. 147 (Pa. 1827). But see Schenck v. Hirschfield, 22 Cal. App. 709 (1910). But not after it has been paid over. Davis v. Fleshman & Co., 245 Pa. 224 (1914). The stakeholder is liable if he pays it over after demand. Ward v. Holliday, 87 Neb. 607 (1910); Cassidy v. Manlick, 21 Pa. D. R. 575 (1910). As to this point, see 61 U. PA. L. REV. 268.

Contracts against public policy, however, differ from mere gambling contracts. The law will have nothing to do with them. Pittsburgh v. Goshorn, 230 Pa. 212 (1911); Matthews v. Lopus, 24 Cal. App. 63 (1911), where recovery from a stakeholder was refused. Those tending to corrupt or interfere with the free exercise of the elective franchise are particularly pernicious and void. Marshall v. B. & O. R. R., 57 U. S. 314 (1853); Basket v. Moss,

115 N. C. 448 (1894). And so in our principal case the court says, ". . . and there is no reason why the wholesome principle should not be extended and properly applied to this case."

CONTRACTS—SUNDAY—RESCISSION—A bill in equity was brought to rescind a sale made on Sunday and to recover the purchase price. *Held:* An action could not be maintained since the contract was illegal and void and imposed a disability upon each of the parties. Bartram v. Morgan, 191 S. W. 317 (Ky. 1917).

This would have been a valid contract at common law. Foreman v. Ahl, 55 Pa. 325 (1867). The principal case follows the general rule that an action arising out of a contract in contravention of a statute for the observation of the Lord's Day cannot be maintained, either to enforce its performance or compel its rescission. Myers v. Mainrath, 101 Mass. 366 (1869); Kelly v. Cosgrove, 83 Ia. 229 (1891); Cohn v. Heinbach, 86 Wis. 176 (1893). The principle of public policy involved is thus expressed: *"Ex dolo malo non oritur actio."* Cranson v. Goss, 107 Mass. 439 (1871). It is the rule in a few jurisdictions that such a contract may be rescinded by a party who first returns the consideration received. Brayce v. Bryant, 50 Mich. 136 (1883); Maurer v. Wolff, 21 N. Y. Supp. 202 (1893).

There is the same difference of authority in the case of executory Sunday contracts. The weight of authority as stated in the principal case is that no action can be maintained thereon either to recover the property or its value or the agreed price. Black v. McMurry, 56 Miss. 217 (1878); Foreman v. Ahl, *supra;* Troewert v. Decker, 51 Wis. 46 (1881). There are decisions the other way. Brown v. Timmany, 20 Ohio 81 (1851). Money paid on an agreement entered into on Sunday may be recovered back so long as the contract remains executory. Adams v. Gay, 19 Vt. 358 (1847). By statute in Maine and Connecticut, a party cannot plead the invalidity of such a contract unless he tenders back the consideration. Wentworth v. Woodside, 79 Me. 156 (1887); Wetherell v. Hallister, 73 Conn. 622 (1901). This exception to the rule as stated by the principal case is statutory. Bank v. Kingsley, 84 Me. 111 (1891).

EXECUTORS—COMPETENCY—The code provided that want of understanding rendered a person incompetent to receive letters, or act as testamentary trustee. A testator of an estate of over $5,000,000 appointed as executor a retired physician sixty-three years old who was partly paralyzed and whose mental faculties were impaired. The surrogate held that only imbeciles and lunatics were disqualified and that the nature and extent of the duties were not to be considered in determining the question of competency. (96 Misc. 419.) The Appellate Division reversed this on the ground that one who because of mental infirmities was unfit to discharge the duties of the trust came within the provision (161 N. Y. S. 372). *Held:* This was the correct rule. The words of the code do not imply an entire lack of understanding. *In re* Leland's Will, 114 N. E. 854 (N. Y. 1916).

The common-law rule is that all persons may be made executors who are capable of making a will; idiots and lunatics are practically the only classes disqualified. Berry v. Hamilton, 12 B. Monroe 191, 54 Am. Dec. 518 (Ky.

1851); Kidd v. Bates, 120 Ala. 79 (1897). The tendency, however, is to enlarge the discretionary power of probate courts by statute so that persons evidently unsuitable to act as executors shall not be qualified, or, if qualified, be removed for cause duly shown. Schouler on Wills, 5th [1915] Ed., Sec. 1033.

Want of understanding as used in this statute is by no means a want of understanding of the legal duties of an administrator. Goods of Shilton, Tucker 73 (N. Y. 1865), where a petition for letters testamentary was unsuccessfully contested by creditors. And the fact that the executor appointed was very bitter towards the testator and at times became so aroused as to be thought temporarily insane did not make him incompetent, for that did not show he lacked ordinary business prudence. McGregor v. McGregor, 1 Keyes 133 (N. Y. 1864).

The Massachusetts statute provides that any executor who becomes incapable of discharging his trust or evidently unsuitable therefor shall be removed. This incapability may arise from defect of memory, want of physical ability, or other like infirmity, and the probate judge has broad discretion. Thayer v. Homer, 52 Mass. 104 (1846). Proof of mere weakness of mind will not be sufficient cause for removing an executor. Evans v. Tyler, 2 Roberts 128 (Eng. 1849). In Estate of Shaw, L. R. [1905] P. 92, an executor was removed because of facts similar to those of the principal case.

HIGHWAYS—NEGLIGENCE—OPERATION OF MOTOR CAR—A motor car operated by A collided with a carriage being driven in the same direction by B. A's lights had refused to work, but he had proceeded after hanging a lantern over the hood. *Held:* Independently of any statute, it is negligence as a matter of law to drive a motor car along the highway on a dark night at such speed that it cannot be stopped within the distance that objects can be seen ahead of it. Fisher v. O'Brien, 162 Pac. 317 (Kan. 1917).

The principal case is in accord with the weight of authority that it is negligence as a matter of law to operate a motor car with lights so dim that the driver is unable to stop when he sees objects in the road. Lanson v. Fond du Lac, 141 Wis. 57 (1909); Harman v. Height, 155 N. W. 563 (Mich. 1915). The driver of a motor car must use that degree of care and caution which an ordinarily careful and prudent person would exercise under the same circumstances. Indiana Springs Co. v. Brown, 165 Ind. 465 (1905); Christy v. Elliott, 216 Ill. 31 (1905); Needy v. Littlejohn, 137 Iowa 704 (1908). In cases which are not so clear-cut as the principal one, the courts hold that the question of negligence is for the jury. Gifford v. Jennings, 190 Mass. 54 (1906). A *prima facie* case of negligence was held made out where it was shown that a motor car was operated after night without headlights in McFern v. Gardner, 121 Mo. App. 1 (1906). The owners of motor cars are subject to reasonable and proper regulations and travellers by motor car have equal rights and liability with those by other vehicles. Hennessy v. Taylor, 189 Mass. 583 (1905); Wright v. Crane, 142 Mich. 508 (1905). The Pennsylvania rules and regulations will be found in Curran v. Lorch, 247 Pa. 429 (1915), and Act of April 27, 1909, P. L. 265.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—POLICEMAN AS EMPLOYEE—A police officer, while attempting to make an arrest, was shot and killed. *Held:* A police officer is not an employee and his dependents are not entitled to compensation. Griswold v. Wichita, 162 Pac. 276 (Kan. 1917).

Whether police officers are included in the term "employee" as used in compensation acts depends largely on the wording of the act. Such persons are expressly excluded from the benefits of the English act, and are not entitled to compensation if injured while performing their duty. Sudell v. Blackburn Corp., 3 B. W. C. C. 227 (Eng. 1910). On the other hand, they are expressly included in acts of other jurisdictions. West Salem v. Ind. Comm., 155 N. W. 929 (Wis. 1916).

Where the act provides for compensation for all persons in the service of a city, except officials, it has been held that a police officer is an official and not entitled to compensation. Blynn v. City of Pontiac, 151 N. W. 681 (Mich. 1915). The principal case was decided partly on the same theory, and partly on the theory that a city is not in the business of employing police officers for gain or profit. It has been held in some cases however, under acts similar in phraseology, that a police officer is an employee whether he is an official or not. State *ex rel.* v. District Court, 158 N. W. 791 (Minn. 1916).

By the terms of the Pennsylvania act, "employer" includes municipal corporations and an employee is one who performs services for another for a valuable consideration. Act of June 2, 1915, P. L. 736. Under this act, the Pennsylvania Workmen's Compensation Board has held that a police officer is an employee. Smith v. City of Reading, 2 Dep. Rep. 1644 (Pa. 1916). However, an elective public officer, *e. g.*, a constable, is not an employee. Shipe v. County of Blair, 2 Dep. Rep. 2290 (Pa. 1916); Sibley v. State, 96 Atl. 161 (Conn. 1915).

It has been held that a town marshal is a police officer and an employee. Village of Kiel v. Ind. Comm., 158 N. W. 68 (Wis. 1916). And where the act provides for compensation for police officers, it has been held that a private citizen injured while assisting a police officer is entitled to compensation as though he had been an officer. West Salem v. Ind. Comm., *supra.*

PARENT AND CHILD—DAUGHTER'S DRESSMAKER BILLS—A wife, unauthorized, pledged her husband's credit for unnecessary gowns for their infant daughter. The husband received the bills, but did not repudiate the transaction until two months after his knowledge thereof. *Held:* As the dressmaker could rightfully, and did, assume the debt was contracted by the husband's authority, he is liable. Ausinger v. Cochrane, 114 N. E. (Mass.) 355.

To charge a father for non-necessaries bought by or for an infant there must be express authority, or the father must have allowed the purchase, in some way leading the vendor to believe the goods were bought by authority or with his consent. The mere relationship does not establish an authority. Cousins v. Boyer, 114 N. Y. App. Div. 787 (1906); Freeman v. Robinson, 38 N. J. L. 383 (1876).

In recent cases parallel to the principal case, the defendant has generally done some positive act indicating assent. In Armstrong Clothing Co. v. Boggs, 90 Neb. 499 (1912), a partial payment was made by the father, and

likewise in Ventress v. Gunn, 6 Ala. App. Ct. Rep. 226 (1912). In Nagler v. L'Esperance, 126 N. Y. S. 655 (1911), the defendant visited the store and expressed approval of goods charged. But Snell v. Haun, 151 S. W. 1077 (Tex. 1912), indicates, in accord with Ausinger v. Cochrane, *supra,* that whether the goods be bought by the infant, or by the wife for the infant, that the father upon learning of the vendor's assumption of an authorized agency must take positive steps to repudiate the assumed agency within a reasonable time after his knowledge thereof, or he will be deemed to have acquiesced in the transaction.

The degree of maintenance which it is a father's duty to provide is variable, dependent upon his and his children's situation and condition in life. De Brauere v. De Brauere, 203 N. Y. 460 (1911). It is the tradesman's duty to show the goods sold the minor were necessaries, *viz.,* such as are usually supplied children in like circumstances. Gately v. Vinson, 182 S. W. 133 (Mo. 1916).

PROPERTY—DEED—DELIVERY IN ESCROW—Where a deed for land was delivered to a third person to be by him delivered to the grantee on performance of a condition, in pursuance of a parol contract of sale, the contract being invalid, the heir of the grantor can recall the deed. Main v. Pratt, 114 N. E. (Ill.) 576.

The principal case is in accord with the general rule that there must be a valid contract of sale for an instrument to operate as an escrow and that in the absence of such a contract the party making the instrument may recall it. Campbell v. Thomas, 42 Wis. 437 (1877); Davis v. Brigham, 107 Pac. 961 (Ore. 1910). The principal case also follows the majority rule that the undelivered deed is not, by itself, a sufficient writing to satisfy the Statute of Frauds. Campbell v. Thomas, 42 Wis. 437 (1877); Kopp v. Reiter, 146 Ill. 437 (1893).

Other authorities hold that the undelivered deed will satisfy the Statute of Frauds if it contains the substance of the parol contract. Parrill v. McKinley, 9 Gratt. 1 (Va. 1853); Magee v. Blankenship, 95 N. C. 563 (1886); Moore v. Ward, 71 W. Va. 393 (1912).

The doctrine of the principal case does not apply to the delivery of a deed to a third person to be delivered to the grantee on the happening of a future certain event, where title passes on the first delivery and no valid contract is required. Campbell v. Thomas, *supra.*

PROPERTY—FIXTURES—BUILDINGS—In a suit to determine the ownership of houses placed on a lot by a tenant. *Held:* The question is a mixed one of law and fact depending on the character of annexation and intention of the parties. If removable houses, erected by a tenant, are not removed at quitting of premises they cannot later be claimed in the absence of a special agreement with the landowner. Noyes v. Gagnan, 114 N. E. 949 (Mass. 1917).

The classic tests for determining whether a chattel has become affixed are the character of the annexation, the adaptability to the uses of the realty, and the intention of the party affixing. Fuller-Warren Co. v. Harter, 110 Wis. 80 (1901). The most important test is the intention of affixer as derived

from all the circumstances rather than the actual intention, Wood v. Holly Co., 100 Ala. 326 (1893); but if it is impossible to remove the chattel without material damage to the realty, this fact is practically conclusive. Farrar v. Stackpole, 6 Greenl. 154 (Me. 1829).

The question is a mixed one of law and fact, Hayford v. Wentworth, 97 Me. 347 (1903), though apparently if all the facts are admitted it is merely a question of law as to intention. Radiator Mfg. Co. v. Hendricks, 72 Mo. App. 315 (1897). Originally a building was *prima facie* a fixture, Ry. Co. v. First Nat. Bank, 134 Ind. 127 (1893), but now the burden of showing the existence of the requisites necessary to effect a transference of a chattel into realty is upon the claimant. Hayford v. Wentworth, 97 Me. 347 (1903). Under this rule a landowner cannot acquire a chattel by affixing to his realty. Chapin v. Freeland, 142 Mass. 383 (1886). Where a chattel is affixed through a mistake as to boundary, it becomes a fixture. Dutton v. Ensley, 21 Ind. App. 46 (1898).

While an affixed chattel may be removable as between a conditional vendor or tenant and the landowner, it generally is a fixture in favor of a mortgagee or purchaser unless the title to realty is acquired with knowledge of the right to remove. Lynn v. Waldron, 38 Wash. 82 (1905).

It is generally held that a dispossessed tenant has a reasonable time to remove fixtures, Bergh v. Safe Co., 69 C. C. A. 212 (1905); though when a lease gives tenant right to remove buildings erected by him and he breaks the lease by a default in rent, it has been held that he loses his right. Van Vleck v. White, 72 N. Y. S. 1026 (1901).

PROPERTY—MERGER OF LIFE ESTATE—LIABILITY OF REMAINDERMAN FOR REPAIRS—A remainderman purchased the dower interest of a widow, and the interest in remainder of four of the other five remaindermen; he then improved the property during the widow's life. *Held:* There was no merger of the undivided one-sixth, and during the widow's life the purchaser held this as a life tenant; consequently, the remainderman who did not join in the conveyance is not liable for the repairs made. Larmon v. Larmon, 191 S. W. 110 (Ky. 1917).

It is fundamental that equity will not allow a merger contrary to the intention of the parties, or where the rights of third parties require that there be no merger. Moore v. Luce, 29 Pa. 260 (1857). Therefore, if two tenants hold the life estate, and one purchases the interests in remainder, there is not a merger so long as the other life estate is outstanding. Johnson v. Johnson, 7 Allen 196 (Mass. 1863). And if one of several cotenants in remainder purchases the life estate, there is no merger which inures to the benefit of all the cotenants. Accordingly, in partition proceedings, the purchaser of the life estate can recover the value of the interest he purchased. McLaughlin v. McLaughlin, 80 Md. 115 (1894).

If the owner of a life estate acquires the fee to only a part of the remainder, there will be a merger only *pro tanto*. Accordingly, the life estate in the remainder of the property is not affected. Clark v. Parsons, 69 N. H. 147 (1897). As a result of this, the purchaser does not become a tenant in common with the other remaindermen, and is not entitled to a contribution from

them for repairs, if this is the theory of the action. Of course, if a life tenant is not entitled to charge the estate for repairs and improvements, the purchaser of only a part of the interest in remainder, being a life tenant, cannot demand a contribution from the remainderman whose interest he did not purchase. Gray's Adm. v. McConnell, 144 Ky. 603 (1911).

PROPERTY—WATER COURSES—FLOOD WATERS—The flood waters of the Wabash River spread over wide expanse of land, but move along with the main current of the stream. A railroad embankment built across this land impeded the flow of the flood waters. *Held:* The railroad company is liable for injuries caused thereby to riparian owners. Evansville, Mt. C. & N. Ry. Co. v. Scott, 114 N. E. (Ind.) 649.

In most jurisdictions the flood waters of a stream which form a continuous body with the water flowing in the ordinary channel is regarded as still a part of the stream, and not as surface water. Crawford v. Rambo, 44 Ohio St. 279 (1886); O'Connell v. East Tenn. Ry. Co., 87 Ga. 246 (1891); Miller v. Canal Co., 155 Cal. 59 (1909). But there is authority for the proposition that it is surface water. Harvey v. N. P. Ry. Co., 63 Wash. 669 (1911). In states where the rule that a lower owner cannot reject the surface waters flowing from land of an upper owner is followed (the civil law rule), there is no reason for attempting to classify overflow waters as either channel or surface. Chicago, *etc.*, Ry. Co. v. Reuter, 223 Ill. 387 (1906). In some states they are considered as in a class distinct from other waters. Thompson v. New Haven Water Co., 86 Conn. 597 (1913). Where the general rule is followed, it has been held that if flood waters escape and join the waters of another water course, there is no liability for impeding the flow of these additional waters. Johnson v. Railroad, 111 Mo. App. 378 (1905). And even where the water left the main body for a time, though it joined the same stream further down, it was held that it became surface water. Singleton v. Ry. Co., 67 Kans. 284 (1903). The principal case accords with the weight of authority.

PROPERTY—WILLS—CHARACTER OF INSTRUMENT—TESTAMENT OR DEED—An instrument executed by three brothers, in actual possession and enjoyment of a plantation, which provided that on the death of any one of them, his interest in the property was to vest in the other, subject only to his personal debts, was held a will and not a deed. Thomas v. Byrd, 73 So. 725 (Ala. 1917).

The intent of the maker is controlling as to whether an instrument is a deed or a will and the question arises in three classes of cases. First, where the testamentary intent is clearly deducible; second, where the intent is of doubtful meaning and ambiguous; third, where it is plainly a deed. Elliott v. Cheyney, 183 Mich. 561 (1914). To operate as a will, the maker's intention must not be that the instrument shall operate as a disposition of any present or future interest before his death; if it passes a present interest, even in a future estate, at the time of its execution, it will act as a conveyance. Mays v. Burleson, 180 Ala. 396 (1913); Tennant v. Tennant Memorial Home, 167 Cal. 570 (1914). And even if the paper is in form a deed, yet if not to become effective until the grantor's death, it is testamentary in character.

Goodale v. Evans, 263 Mo. 219 (1914). The words used must fairly indicate grantor's intent to pass a present irrevocable interest in the property, in order that it may be construed a deed. Phifer v. Mullis, 167 N. C. 405 (1914); Wimpey v. Ledford, 177 S. W. 302 (Mo. 1915). When an instrument may be construed as either a conveyance or a will according to circumstances, the court will incline in favor of its testamentary character, without attaching controlling importance to mere form. Seay *et al.* v. Huggins, 70 So. 113 (Ala. 1915).

On the other hand, a deed may be made which contains a provision that it shall not take effect until the maker's death, but it is important that it shall be delivered, otherwise the instrument would assume testamentary character. Nowakowski v. Sobeziak, 270 Ill. 622 (1915). But if it is recorded by the grantor with the intention of delivering it, it will not be held a will, and oral testimony is not admissible to show that he intended it to be a testamentary disposition. Jones v. Caird, 153 Wis. 384 (1913); Burkey v. Burkey, 175 S. W. 623 (Mo. 1915). An option given to a lessee to purchase the demised land after lessor's death has been held to be contractual and not testamentary. Smith Co. v. Anderson, 84 N. J. Equity, 681 (1915).

In case of doubt, some courts hold that the instrument is to be construed whichever way it may be operative, and not the way in which it would be void and inoperative. Stevens v. Haile, 162 S. W. 1025 (Tex. 1914); Trumbauer v. Rust, 36 S. Dak. 301 (1915).

SALES—DELIVERY TO CARRIER—RIGHT TO INSPECT—Under a contract of sale, coffee, billed to vendee subject to right to inspect, was delivered to a common carrier. The coffee was lost in transit. In a suit for the price of sale, *held:* Delivery to a common carrier raises a presumption of delivery to vendee which is not rebutted by reservation of right to inspect the goods. Robbins v. Brazil Syndicate R. & B. Co., 114 N. E. 707 (Ind. 1917).

The principal case seems to be in accord with the weight of authority. The delivery to a carrier is deemed a constructive delivery to the vendee because under the contract of carriage, such delivery divests the vendor of his right to possession and vests it in the vendee. Rickey v. Tutelman, 19 Pa. Super. Ct. 403 (1902). The goods delivered must fulfill the contract requirements as to quality, Baird v. Pratt, 78 C. C. A. 515 (1906), and time of shipment. McKelvey v. Perham, 31 Mont. 602 (1905).

Generally a right to inspect and return if goods do not come up to standard does not change the presumption as to delivery passing title, Kid Co. v. Leather Co., 89 Atl. 367 (Del. 1914); though some cases hold the contrary rule. Deutsch v. Dunham, 72 Ark. 141 (1904). If the goods do not fulfill the contract requirements no title passes, even on receipt by vendee, Dube v. Clothing Co., 153 N. Y. S. 577 (1915); but if it is a "Sale or Return" contract re-delivery to carrier by vendee revests title in vendor. Drug Co. v. Zeller Co., 191 Ill. App. 508 (1915).

TORTS—LIABILITY OF TOWNS—A city is not liable for an injury caused by the faulty construction of a free public bathhouse. Bolsler v. City of Lawrence, 114 N. E. 722 (Mass. 1917).

The general rule is that a city is not liable for injuries caused by defects

in property owned by it and used solely for public benefit, as in the case of a schoolhouse, Howard v. Worcester, 153 Mass. 426 (1891); and a public park, Russell v. Tacoma, 8 Wash. 156 (1894). Similarly, such municipalities are not liable for the negligence of officers whose duties are purely governmental or performed solely for public good, as the police, Tomlin v. Hildredth, 65 N. J. L. 438 (1900); firemen, Kies v. Erie, 135 Pa. 144 (1890); health officers, Beeks v. Dickinson County, 131 Ia. 244 (1906). However, the city is liable for the care of its property from which it derives a profit, as water works, Boothe v. Fulton, 85 Mo. App. 16 (1900); a rented town hall, Little v. Holyoke, 177 Mass. 114 (1900); a toll wharf. Milley v. Allegheny, 118 Pa. 490 (1888).

In Pennsylvania, however, a municipality is liable even for the care of that property which is devoted solely to public good, just as any other landowner, Powers v. Phila., 18 Super. Ct. 621 (Pa. 1902); such as a public park, Barthold v. Phila., 154 Pa. 109 (1893); a fire engine house, Kies v. Erie, 169 Pa. 598 (1895); an elevator in a public building. Fox v. Phila., 208 Pa. 127 (1904).

WITNESSES—ATTORNEY AND CLIENT—PRIVILEGE—PROFESSIONAL EMPLOYMENT—In a suit on a deed, the attorney employed by the parties to draft it was questioned as to the real nature of the transaction. *Held:* The communication was not made to him in his professional capacity and is not privileged. Shepard v. Mendenhall, 191 S. W. 237 (Ark. 1917).

The common-law rule which prohibits an attorney from testifying to any communication made to him by a client, without the client's consent, has been very generally enacted into statute law. For a summary of the statutes see Wigmore on Evidence, 3204, note 1. The test as to whether the communication is privileged is whether the attorney's employment is so connected with his professional character as to afford a presumption that this formed the ground of the confidence reposed. Alexander v. Queen, 253 Pa. 195 (1916). Accordingly, as in the principal case, where an attorney is employed merely as a scrivener to draft a deed, contract or other legal paper, it is held no privilege attaches to communications made to him. Mueller v. Batcheler, 131 Iowa 650 (1906); Childress v. Tate, 148 S. W. 843 (Tex. 1912); Chi. Lumber Co. v. Cox, 94 Kansas 563 (1915). But in a few states and in England, such employment seems to be regarded as professional and so the privilege attaches. Carpmall v. Powis, 1 Phil. Ch. 687 (1846); Brown v. Butler, 171 Conn. 576 (1899). And when the attorney's advice is asked, or the grantee who employs him tells him to be sure a good title is conveyed, there seems no doubt that the employment is professional and the communication privileged. Crane v. Barkdoll, 59 Md. 534 (1882); Carter v. West, 93 Ky. 211 (1892). The whole conversation is protected, not merely that part in which advice is asked. Mostyn v. West Mostyn Coal Co., 34 Law Times 531 (Eng. 1876); Maas v. Bloch, 7 Ind. 202 (1855).